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not a subject of that part.[18] It is obvious that an individual can be a British subject without being a subject of the United Kingdom. But it has never been suggested in modern times that a British subject born in a possession would be an alien in the British Isles. And there is no good reason why a naturalized colonial should in this respect be considered in a different class. His British nationality would prevent his being an alien. An analogous situation existed at a time when Porto Ricans were not citizens of the United States. Although not citizens in the United States they were nationals of the United States because citizens of Porto Rico, and hence they were not considered as aliens.[19] The decision of the court in *Ex parte Markwald* is based upon a strained and unfortunate interpretation of statutes.[20] It seems even more strained in that it disregarded a contemporary statute which appears to settle the question conclusively the other way. The British Nationality and Status of Aliens Act of 1914 defines the terms "alien" and "British subject," [21] repeals former naturalization laws, and provides that naturalization by a British possession has the same effect as that granted in England.[22]

THE STEEL CORPORATION CASE.[1] — The United States Steel Corporation was formed in 1901 as the culmination of a series of prior combinations resulting in part from the necessity of integration, that is, vertical combination with continuity of operations from the mine to the finished product. The Steel Corporation was a combination of combinations bringing under one control about one hundred and eighty concerns which prior to the original mergers had produced from eighty to ninety per cent of the total output of the country. Dissolution proceedings were begun under the Sherman Anti-Trust Act in 1911 and the bill was dismissed by the District Court,[2] the four judges finding that

[18] Gibson *v.* Gibson, [1913] 3 K. B. 379; *Re* Johnson, Roberts *v.* The Attorney General, [1903] 1 Ch. 821. In the latter case Farwell, J., said, (at p. 832), "He is a subject of the British Crown and . . . his nationality is the British Empire."

[19] Gonzales *v.* Williams, 192 U. S. 1 (1903). See 17 HARV. L. REV. 412.

[20] It was not necessary to hold that Markwald was an alien because of war-time exigencies. Power had been conferred upon the Crown to try by court martial any person who communicated with the enemy or committed other forbidden acts. See Defense of the Realm Act of 1914, 4 & 5 GEO. V, c. 29; The King *v.* Halliday, *Ex parte* Zadig, [1917] A. C. 260.

[21] See 4 & 5 GEO. V, c. 17, § 27.

[22] *Ibid.*, §§ 8 (2), 28. This statute defines an alien as one who is not a British subject, and a British subject as a natural-born subject, or one to whom a certificate of naturalization has been granted "under the provisions of this Act or under any Act repealed by this Act." It repeals the Naturalization Act of 1870. It is therefore difficult to understand why a person naturalized in Australia in 1908 would not come within the express statutory definition of a British subject. In determining what the term alien included in the Aliens Restriction Act of 1914 the court might well have taken into account the definition contained in the British Nationality and Status of Aliens Act of 1914.

[1] For a review of the authorities under the Sherman Anti-Trust Act through the Standard Oil and Tobacco cases see 25 HARV. L. REV. 31. Important decisions since that article are Standard Sanitary Mfg. Co. *v.* United States, 226 U. S. 20 (1912); United States *v.* Winslow, 227 U. S. 202 (1912); Eastern States Lumber Ass'n *v.* United States, 234 U. S. 600 (1913). See also Albert M. Kales, "Good and Bad Trusts," 30 HARV. L. REV. 830; "The Sherman Act," 31 HARV. L. REV. 412.

[2] 223 Fed. 55 (1915).

the corporation did not have control of the industry.[3] This was affirmed in the Supreme Court by a four to three decision.[4] The findings of fact are that the corporation was formed for the illegal purpose of restraining trade by monopolization, that this purpose was abandoned immediately, and that the corporation possessed neither the desire nor the power to dominate the industry, the court distinguishing the purpose of the organizers from that of the corporation. It was found further that the corporation had entered into illegal price agreements with competitors but that these agreements had been abandoned prior to the bill. The question before the court is whether or not the corporation should be dissolved. The reasoning of the majority is that although the corporation was illegal in its inception and had fixed prices, "whatever there was of wrong intent could not be executed, whatever there was of evil effect was discontinued before this suit was brought," and the remedy being in the discretion of the court of equity, dissolution is not necessary.[5] The position of the minority is that, taking the facts as found by the majority, the corporation attained its present size by illegal combination, it has maintained its position through illegal acts (price agreements), and that its existence is a violation of the Sherman Act, calling for dissolution. The minority also dissent on the finding that the corporation has not a dominant position in the industry.

The decision is, then, that a combination which is illegally formed, but which is not a monopoly, may save itself from dissolution by subsequent good conduct. The factors which determined the court seem to be the absence of unfair methods of competition, the uniform decrease in the Steel Corporation's percentage of the country's production,[6] and the large foreign trade built up where others had previously failed. These indicated to the court a decreasing danger of monopoly and a legitimate reason for the continued existence of the corporation.

The case has two aspects to be considered for future decisions.[7] The government's contention was that a combination "may be illegal because it acquires a dominating power, not as the result of normal growth and development, but as a result of a combination of competitors," an

[3] Although agreeing as to the absence of domination in fact, there was a division of opinion in the District Court as to the purpose for which the Steel Corporation was formed. Two judges expressed the view that the purpose was not monopoly but "concentration of efforts with resultant economies and benefits." The other two judges were of the opinion that the purpose of the organizers was to monopolize and restrain trade, which view was concurred in by the majority in the Supreme Court.

[4] United States *v.* United States Steel Corporation, U. S. Sup. Ct., No. 6, October term, 1919 (March 1, 1920). Mr. Justice McReynolds and Mr. Justice Brandeis took no part in the case. See RECENT CASES, page 986.

[5] The District Court offered to retain jurisdiction of the cause in order that if illegal acts should be attempted they could be restrained. The government did not avail itself of the offer.

[6] From 1901 to 1911 the Steel Corporation's proportion of the domestic business decreased from 50.1 per cent to 40.9 per cent.

[7] The FEDERAL TRADE COMMISSION ACT of Sept. 26, 1914, 38 STAT. AT L. 717, provides that in proceedings in equity under the anti-trust Acts, the court may refer the suit to the Federal Trade Commission, as a master in chancery, to ascertain the appropriate form of a decree. In view of the finding of illegality in the formation of the Steel Corporation, the suit might have been referred to the commission to ascertain the practicability of stripping the corporation of the advantages illegally acquired. This was not discussed by the court.

illegal purpose being a "matter of aggravation." This is answered by the finding that the corporation did not have the power to dominate, but the court goes on to say, "the law does not make mere size an offense, or the existence of unexerted power an offense. It requires . . . overt acts." Does the court mean that if the Steel Corporation had achieved dominating power, it would still have been saved from dissolution because the power had not been used? If so, why should emphasis have been placed on the fact that the corporation was not a monopoly? The second aspect is the discussion of the usual powers of discretion of a court of equity in determining what remedy, if any, shall be given. Does the court mean that having found the Steel Corporation to be within the prohibitions of the Sherman Act, the court may, in its discretion, deny a remedy? The existence of discretion when equitable jurisdiction is conferred by statute was denied in the Paper Bag Patent case,[8] where the court enjoined infringement of a patent acquired by the plaintiff to protect his monopoly by keeping the invention out of the market. If there is no discretion under the patent statute, which was merely declaratory of the common-law jurisdiction of equity, it would seem even clearer that there is no discretion under the Sherman Act, which creates a new equitable jurisdiction. The principal case throws doubt on the holdings in the patent cases.

It was unfortunate that a decision of such importance should have been handed down by less than the full court, for the majority in the case is a minority of the court. The decision cannot be relied on as a precedent with safety.

PRICE RESTRICTION ON THE RESALE OF CHATTELS. — Two recent cases [1] before the Supreme Court of the United States have raised again, in somewhat different form, the question of attempted price maintenance on the resale of chattels — condemned in the well-known case of *Dr. Miles Medical Co.* v. *Park & Sons*.[2] In each of these late cases a manufacturing corporation was indicted under Section 1 of the Sherman Anti-Trust Law.[3] The substance of the activity of the defendant in each instance was an attempt to establish a uniform price for resale by the dealers to whom it sold that product. In neither of the cases was it charged that the defendant had monopolized or attempted to monopolize any part of its industrial field. In each case the defendant manufactured "branded," or "specialty," goods.

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[8] 210 U. S. 405 (1907).

[1] United States *v.* Colgate & Co., 250 U. S. 300 (1919); United States *v.* A. Schrader's Son, Inc., U. S. Sup. Ct., No. 567, Oct. Term, 1919 (March 1, 1920). See RECENT CASES, page 986.

[2] 220 U. S. 373 (1911). While the court in this case had before it only the question of whether a covenant to maintain prices on resale could be enforced against third persons who took the chattel with notice of the covenant, the court based its denial of relief on the ground that the contract was illegal as in restraint of trade.

[3] Sherman Act of July 2, 1890, c. 647, § 1; 26 STAT. AT L. 209. "Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor. . . ."